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8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA  
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11 ALLEN COLEMAN, et al.,

12 Plaintiffs,

13 v.

14 KATHLEEN STERLING, et al.,

15 Defendants.  
16  
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CASE NO.09-CV-1594 W (BGS)

**ORDER DENYING PLAINTIFFS'  
MOTION FOR LEAVE TO FILE A  
SECOND AMENDED  
COMPLAINT [DOC. 69]**

18 Pending before the Court is Plaintiffs' motion for leave to file a second amended  
19 complaint. Specifically, Plaintiffs seek to add Joseph McFaul as a defendant to the  
20 existing Seventh Claim for violation of 42 U.S.C. § 1983 based on the deprivation of  
21 rights under the Fourteenth Amendment of the United States Constitution.<sup>1</sup>  
22 Defendants oppose.

23 The Court decides the matter on the papers submitted and without oral  
24 argument. See Civ. L.R. 7.1(d)(1). For the following reasons, the Court **DENIES**  
25 Plaintiffs' motion. (Doc. 69.)

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27 <sup>1</sup> The motion also sought to add Julie Biggs as a defendant to the Seventh Claim.  
28 However, Plaintiffs have since filed a notice withdrawing their request to add Biggs as a  
defendant. (Doc. 78.)

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2 **I. BACKGROUND**<sup>2</sup>

3 On April 16, 2010, Plaintiffs filed a First Amended Complaint (“FAC”), the  
4 operative complaint in this action. (Doc. 34.)

5 Plaintiffs were all senior executives employed by Defendant Tri-City Healthcare  
6 District (“District”), a public entity under state law, under written employment  
7 agreements, and written procedures and policies adopted by the District. (FAC ¶¶ 11,  
8 125 [Doc. 34].) In December 2008, Plaintiffs were placed on administrative leave  
9 “without any notice or explanation.” (FAC ¶ 127.) On April 23, 2009, Defendants  
10 terminated Plaintiffs’ employment “without providing the materials, facts and evidence  
11 upon which their contracts were terminated, without having provided timely notice of  
12 the allegations of employment wrongdoing[,] and without an opportunity to meaningful  
13 [sic] respond to the charges against them.” (FAC ¶ 128.) On July 15, 2009, Plaintiffs  
14 filed a complaint for breach of contract, constitutional violations, breach of the  
15 California Labor Code, defamation, and intentional infliction of emotional distress  
16 against Defendants.

17 McFaul is an attorney who was retained by the District to perform an  
18 investigation concerning accusations of misconduct involving Plaintiffs. (*McFaul Decl.*  
19 ¶¶ 2, 3 [Doc. 62]; SAC ¶ 55 [Doc. 69-2].) According to the allegations in the Proposed  
20 SAC, McFaul prepared reports “constituting over 250 pages containing allegations of  
21 wrongdoing against [Plaintiffs] in concert with Defendant Larry Anderson and [J] Biggs.”  
22 (SAC ¶ 134.) Plaintiffs allege that “[t]hese reports were secretly presented to the  
23 District Board which relied upon the information when authorizing Defendant Larry  
24 Anderson to terminate [Plaintiffs].” (*Id.*) Plaintiffs further allege that McFaul, Biggs,  
25 and Defendant Anderson “agreed to work together with the intent to terminate  
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27 <sup>2</sup> The relevant facts for the pending motion are as follows. Some of the allegations  
28 below are contained in Plaintiffs’ Proposed Second Amended Complaint (“SAC”), which is  
attached as Exhibit A to Robert M. Mahlowitz’s Declaration. (Doc. 69-2.)

1 [Plaintiffs] in violation of Section 1983 and the due process protections . . . by  
 2 concealing evidence of alleged wrongdoing from [Plaintiffs], preventing them from  
 3 addressing the evidence assembled against them, crafting a termination procedure that  
 4 offered no pre or post-termination hearing . . . .” (*Id.*)

5 On November 30, 2010, Plaintiffs filed the instant motion for leave to file a  
 6 second amended complaint that seeks to add McFaul as a defendant to the Seventh  
 7 Claim for violation of 42 U.S.C. § 1983. Defendants oppose. (Docs. 75, 76.)

## 8 9 **II. LEGAL STANDARD**

10 Rule 15(a) of the Federal Rules of Civil Procedure provides that after a responsive  
 11 pleading has been served, a party may amend its complaint only with the opposing  
 12 party’s written consent or the court’s leave. Fed. R. Civ. P. 15(a). “The court should  
 13 freely give leave when justice so requires,” and apply this policy with “extreme  
 14 liberality.” *Id.*; DCD Programs, Ltd. v. Leighton, 833 F.2d 183, 186 (9th Cir. 1987).  
 15 However, leave to amend is not to be granted automatically. Zivkovic v. S. Cal. Edison  
 16 Co., 302 F.3d 1080, 1087 (9th Cir. 2002) (citing Jackson v. Bank of Hawaii, 902 F.2d  
 17 1385, 1387 (9th Cir. 1990)). Granting leave to amend rests in the sound discretion of  
 18 the district court. Pisciotta v. Teledyne Indus., Inc., 91 F.3d 1326, 1331 (9th Cir. 1996).

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 20 The Court considers five factors in assessing a motion for leave to amend: (1) bad  
 21 faith, (2) undue delay, (3) prejudice to the opposing party, (4) futility of the  
 22 amendment, and (5) whether the plaintiff has previously amended the complaint.  
 23 Johnson v. Buckley, 356 F.3d 1067, 1077 (9th Cir. 2004). Of these factors, prejudice  
 24 to the opposing party carries the greatest weight. Eminence Capital, LLC v. Aspeon,  
 25 Inc., 316 F.3d 1048, 1052 (9th Cir. 2003). However, absent prejudice, a strong showing  
 26 of the other factors may support denying leave to amend. See id.; Allen v. City of  
 27 Beverly Hills, 911 F.2d 367, 373 (9th Cir. 1990) (holding that futility supports a court’s  
 28 decision to deny a motion for leave to amend).

1 Futility is a measure of the amendment's legal sufficiency. "[A] proposed  
 2 amendment is futile only if no set of facts can be proved under the amendment . . . that  
 3 would constitute a valid and sufficient claim or defense." Miller v. Rykoff-Sexton, Inc.,  
 4 845 F.2d 209, 214 (9th Cir. 1988). Thus, the test of futility is identical to the one  
 5 applied when considering challenges under Rule 12(b)(6) for failure to state a claim  
 6 upon which relief may be granted. Baker v. Pac. Far East Lines, Inc., 451 F. Supp. 84,  
 7 89 (N.D. Cal. 1978); see Saul v. United States, 928 F.2d 829, 843 (9th Cir. 1991) ("A  
 8 district court does not err in denying leave to amend . . . where the amended complaint  
 9 would be subject to dismissal." (citation omitted)).

### 10 11 **III. DISCUSSION**

12 To state a claim for relief under 42 U.S.C. § 1983, plaintiffs must demonstrate  
 13 that the defendants: (1) were acting under color of state law, and (2) deprived him of  
 14 a right, privilege, or immunity secured by the Constitution or laws of the United States.  
 15 West v. Atkins, 487 U.S. 42, 48 (1988); Kildare v. Saenz, 325 F.3d 1078, 1085 (9th  
 16 Cir.2003). Generally, a private individual is not acting under color of state law. Price  
 17 v. Hawaii, 939 F.2d 702, 707-08 (9th Cir. 1991). "Private attorneys do not act under  
 18 color of state law when engaged in the private practice of law." Rushdan v. Hale, No.  
 19 C02-1325TEH(PR), 2002 WL 981863, at \*1 (N.D. Cal. May 7, 2002) (citing Franklin  
 20 v. Oregon, 662 F.2d 1337, 1345 (9th Cir. 1981)); see also Polk Cnty. v. Dodson, 454  
 21 U.S. 312, 325 (1981) ("[A] lawyer representing a client is not . . . a state actor 'under  
 22 color of state law' within the meaning of § 1983."). However, a private individual can  
 23 be held liable under § 1983 only if "the actions complained of are 'fairly attributable' to  
 24 the government." Morse v. N. Coast Opportunities, Inc., 118 F.3d 1338, 1340 (9th Cir.  
 25 1997).

26 "[A]n otherwise private person acts 'under of color of' state law when engaged  
 27 in a conspiracy with state officials to deprive another of federal rights." Tower v.  
 28 Glover, 467 U.S. 914, 920 (1984). To prove a conspiracy between the state and private

1 individuals under § 1983, the plaintiff must allege facts with sufficient particularity to  
2 show an agreement or meeting of the minds to violate constitutional rights. Margolis  
3 v. Ryan, 140 F.3d 850, 853 (9th Cir. 1998); Woodrum v. Woodward Cnty., 866 F.2d  
4 1121, 1126 (9th Cir. 1989). “To be liable, each participant in the conspiracy need not  
5 know the exact details of the plan, but each must at least share the common objective  
6 of the conspiracy.” Franklin v. Fox, 312 F.3d 423, 441 (9th Cir. 2002) (internal  
7 quotations omitted). Moreover, conclusory allegations are insufficient to state a claim  
8 of conspiracy. Simmons v. Sacramento Cnty. Superior Court, 318 F.3d 1156, 1161 (9th  
9 Cir. 2003); see Fed. R. Civ. P. 9; Price, 939 F.2d at 707-09 (allegations of conspiracy are  
10 subject to a heightened pleading requirement).

11 In this case, Plaintiffs allege that McFaul conspired with Defendants to terminate  
12 Plaintiffs’ employment in violation of § 1983 and their due-process rights. The SAC  
13 includes conduct that allegedly violated Plaintiffs’ rights, such as denying access to the  
14 investigative reports and crafting a termination procedure that did not offer a hearing.  
15 However, the facts pled do not suggest McFaul engaged in these acts. Rather, the facts  
16 pled show that McFaul conducted an investigation, and then produced and presented  
17 reports of his findings to *his client*, the District, as a private attorney. Furthermore,  
18 McFaul working “in concert” with Defendants does not suggest a conspiracy given that  
19 attorneys traditionally *must* work with their clients in representing them. McFaul’s  
20 conduct was well within the traditional duties of a private attorney. Therefore,  
21 Plaintiffs’ proposed amendment is futile because they fail to allege facts with sufficient  
22 particularity to show an agreement or meeting of the minds between McFaul and his  
23 clients to violate Plaintiff’s constitutional rights.

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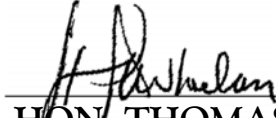
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1 **IV. CONCLUSION**

2 For the foregoing reasons, the Court **DENIES** Plaintiffs' motion for leave to file  
3 a second amended complaint. (Doc. 69.)

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5 **IT IS SO ORDERED.**

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7 **DATE: March 7, 2011**

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9 **HON. THOMAS J. WHELAN**  
10 United States District Judge  
11 Southern District of California  
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